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THE ROBERTS CASE AS ILLUSTRATING A GREAT PREROGATIVE OF CONGRESS.

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The Federal Constitution, Article 1, Section 2, provides that, "No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen."

At the regular election in November, 1898, Brigham H. Roberts was chosen by the electors of the State of Utah their representative in the Fifty-sixth Congress. He was twenty-five years of age, had been seven years a citizen of the United States and was, when elected, an inhabitant of the State of Utah. The proper officers of the State duly certified to his election and the certificate was filed with the clerk of the House of Representatives.

At the opening of the first session of the Congress to which he was elected, objection was made to his being sworn in on the ground that he was a polygamist. After investigation and full argument, the House, by an overwhelming vote, refused to permit him to take his seat.

The rightfulness of this exercise of power has been questioned and the grounds of the objection to it have been fully set out in the report of the minority of the committee appointed to investigate the case and in the debate which followed on the floor of the House.

Judging from my own experience, and that of most of those with whom I came in contact in the discussion of this question, the first impression is against the right of the House to refuse admission to a person, duly elected and possessing the qualifications which Roberts possessed. In my own case, reflection and investigation led me to an opinion contrary to that which I first entertained, and the same result occurred in the minds of a large majority of members, who, at the outset, thought as I did.

The action of the House has, in some quarters, been attributed to hysteria and emotion. Nothing could be farther from the truth. The alternative method of admitting Roberts and instantly thereafter expelling him satisfied every demand of mere emotion and was indeed insisted upon by those who planted themselves solely on the moral and sentimental side of the question.

The limits of such a paper as this permit only brief discussion. An argument fully covering the ground would involve an exhaustive inquiry into the form and philosophy of government and of our own government in particular. Indeed, while a constitutional question, it is more aptly to be described as institutional. To have permitted Roberts to take his seat would have been to deny the very right of government. While his exclusion was in strict accord with the Constitution, yet the action which the House took can be sustained on elemental principles which it would be impossible to deny in a constitution.

The Constitution, Article 1, Section 5, provides that, "Each House shall be the judge of the elections, returns and qualifications of its own members."

Without, at this stage, discussing the question as to whether either House of Congress, or both combined, can add to the constitutional qualifications set out in the first paragraph of this paper, or disqualify for any reason not implied therein, a moment's reflection convinces one that Congress, as a law-making body, cannot pass a law adding a new qualification or creating a disqualification for membership in either House which will be binding on any subsequent House.

To admit that such a power exists is to say that a Congress today can declare how the next Congress shall be constituted. As our national legislative body is created by the Constitution, it cannot have a single power taken from it or a single limitation put upon it by any other body. Nevertheless, it is true that Congress has, from time to time, passed laws imposing

new qualifications or declaring disqualifications applicable in terms to succeeding Congresses; but they were permitted to be so considered only in an advisory or suggestive sense and not compulsorily.

The question in the Roberts case was substantially this: Are the provisions of Article 1, Section 2, declaring that no person shall be a Representative in Congress unless he possesses certain named qualifications, exclusive? That is to say, do they deny to either House of Congress the right to add new qualifications for membership or to create disqualifications. A distinction is to be drawn between the addition of a new qualification and the creation of a disqualification arising out of the voluntary act of the individual who places himself, by the commission of an offense, against the law or civilization, within the disqualified class. As for instance, for the House to say that it will not admit a member-elect because he cannot read and write is to be sharply differentiated from the refusal of the House to admit a murderer, a lunatic, or a traitor. I do not know that any commentator or any court or either house of Congress has ever questioned the propriety of that distinction, and it has, so far as I have been able to find, been persistently recognized whenever the question was clearly raised.

It is not my purpose to pursue more than one phase of this great question. The argument in favor of the exclusion of Roberts, in so far as it is not covered by what I shall hereafter say, is briefly summarized as follows:

1. The language of the constitutional provision, the history of its framing in the constitutional convention, and its context clearly show that it cannot be construed to prevent disqualification for crime.

2. The overwhelming authority of text-book writers on the Constitution is to the effect that such disqualification may be imposed by the House, and no commentator of the Constitution specifically denies it.

3. The courts of several of the States in construing analogous provisions, have with practical unanimity declared against such narrow construction of such constitutional provisions.

4. The House of Representatives has never denied that it had the right to exclude a member-elect, even when he had the three constitutional requirements.

5. In many instances it has distinctly asserted its right so to do in cases of disloyalty and crime.

6. It passed in 1862 the test-oath act, which imposed a real and substantial disqualification for membership in Congress, disqualifying hundreds of thousands of American citizens. This law remained in force and was obeyed for twenty years.

7. The House in 1869 adopted a general rule of order, which continued operative for some years, providing that no person should be sworn in as a member against whom the objection was made that he was not entitled to take the test oath; if upon investigation such fact appeared, he was to be permanently debarred from entrance.

It is not contended that either the dictum of the commentators, the judgment of a court, or a legislative precedent establishes the law or is conclusive upon Congress in a question involving the right of a member to his seat; yet they are persuasive, and when agreeing as uniformly as we find them in this relation, they are absolutely convincing.

Nevertheless, it will profit us to examine the whole question on elemental principles.

The Federal Congress is the highest legislative body known to our laws. It was created by the Constitution and must, of course, possess all the rights and powers which the Constitution gives it and all those inherent and elementary powers necessary to its own life which the Constitution does not distinctly deny to it, and as Judge Cooley remarks, "The Constitution must be construed in the light of the common law."

Roberts was charged with, and before the committee appointed to investigate his case, was conclusively proven guilty of, being an open, flagrant, and defiant polygamist, claiming that the Acts of Congress in that respect were not binding upon him.

The institution of polygamy has been denounced by both Congress and the Supreme Court. In Congress by the most solemn and well-considered enactments; by the Supreme Court in many profound and thoughtful decisions. The student of legislative enactment and of the highest judicial consideration of it, will find a rich mine of information and instruction if he examines the few laws which Congress has passed respecting polygamy, and carefully reads what our Supreme Court says of them. As the initiative of these laws was with the body of the people, they aroused the interest and enlisted the activity of the ablest and most acute statesmen of the last thirty years; and our highest court has given them the most philosophic consideration.

Many years ago, Congress began to legislate on the subject and in 1882 it enacted what is known as the Edmunds law; a really effective law harmonizing, at once, with the demand of civilization and the spirit of judicial construction. By that Act polygamy was clearly defined and provision made for its severe punishment. Its incidental relations were also defined and suitable punishment provided for.

In passing on an earlier Act providing a punishment for polygamy, Chief Justice Waite, in the course of an elaborate opinion setting forth the views of a united court, said:

"Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon church, was almost exclusively a feature of Asiatic and of African people.

"Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people to a greater or less extent rests.

"Can a man excuse his practices to the country because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

In construing the Edmunds Act, Justice Matthews, voicing the unanimous opinion of the court, says:

"Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization, the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."

The spirit of these two excerpts is apparent in all the opinions delivered by the Supreme Court in cases arising out of polygamy.

Several of our Presidents have deemed the subject of such importance as to make reference to it in their annual messages and to congratulate the people upon the apparent eradication of polygamy.

We thus discover every branch of the Federal government, in the most solemn language, laying down the proposition that monogamy is the corner-stone of our civilization; that our government grows out of and is dependent upon that civilization, and that polygamy wars against it.

After the passage of these laws, after these solemn judicial declarations, after the executive proclamation justly characterizing those who practiced polygamy, Brigham H. Roberts contracted two polygamous marriages, making three matrimonial ventures in progress at the same time. He did not do so with the idea that the Supreme Court would declare unconstitutional the Edmunds Act which he was violating. That court had several times sustained it, and never after Brigham Roberts' first unlawful marriage was it even called upon to pass upon its constitutionality. It was universally recognized as valid. He continued and persisted in maintaining his polygamous relations up to the time of his election to Congress. He was not one of those who had contracted a plural marriage before the courts had settled the propriety of congressional enactments denouncing them. He was absolutely without excuse, except that he did not recognize the validity of any law of Congress or any judgment of the Supreme Court so long as they interfered with his views on the subject of plural marriages. He frequently declared himself above the law and not bound by it, and he illustrated this declaration and his contempt for Congress and the Courts by contracting two plural marriages. We look in vain through all our history for another such defiant, persistent, audacious violator of a solemnly enacted law which had in it the elements both of good morals and of civilization, and hence the vital elements of government.

Now in a popular government, practically administered, a man's opinions are of little moment, and no attention would have been paid to Roberts' opinion if he had not expressed himself in acts which were openly and defiantly violative of the law; violative of laws passed by the very body which he sought to enter.

As before indicated, the whole argument in favor of the admission of Roberts was based upon the assertion of a technical rule of law, to wit: "The expression of one thing is the ex-

clusion of another" and that the sum and substance of congressional power, in this respect, was bound up in the proposition that any person elected to Congress must be admitted if he possessed the necessary qualifications—age, citizenship, and inhabitancy. That is to say, according to the contention of those who maintained the other side of this question, Article 1, Section 2, in its present form, meant precisely the same as if it read, "Every person who is of the age of twenty-five years, etc., shall, if elected, be permitted to take his seat in Congress." If the makers of the Constitution had meant any such thing they could have phrased it in fewer and happier words than are used in the Constitution as it now stands.

Let us see what conclusion we can arrive at from implication—and it is only by the rule of necessary implication that Roberts' admission could be justified.

Elsewhere, the Constitution says, "This Constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land." If Congress was without rightful power to exclude Roberts, then, for the purpose of his case, we must read into the Constitution, other words which are now said to be implied, so that the provision I have just called for would read as follows:

"This Constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, provided, that no person shall be ineligible to a seat as Representative who, in form and substance, in word and act, in life and practice defies this Constitution and the laws made in pursuance thereof, and denies their validity and supremacy."

If the Federal Constitution had made such a declaration which, it is now declared, must be implied, that Constitution and the government which it sought to create could not have endured for a single day.

Judge Shaw says in *Hiss v. Bartlett* (3 Gray 473), "It is necessary to put extreme cases to test a principle."

Let me put one or two extreme, but entirely fair and proper cases, with which to test this principle. Suppose that Brigham H. Roberts, instead of being charged with polygamy, had been charged with actual treason, which was proven to the satisfaction of Congress by a credible witness whose testimony was undisputed, and Roberts himself had admitted that he had waged war against the United States, had given aid and comfort to Spain, actively, not constructively, and had appeared

before the House and said: "I did wage war against the United States; I did give aid and comfort to its enemies in time of war against a foreign foe, and I glory in it."

In that state of facts the law could not lay its hand upon him for the crime of treason because the Constitution declares that no person shall be convicted of treason except upon the testimony of two witnesses to the same overt act or by confession in open court. Suppose that he, in that status, appeared before the House with a certificate of election from a sovereign State and demanded admission. Would he be admitted? Not if the House had any conception of government and the dignity and duty of a legislative body.

Another illustration. Suppose that on the first day of January, 1899, two months after his election and two months before his term as Representative commenced, he had been charged with the crime of counterfeiting and was tried, convicted, and sentenced to the penitentiary for a term of two years; suppose that it so occurred that his term of imprisonment would expire on the third day of March, 1901, the day before his term as Representative in Congress expired. Assuming that he presented himself on that day, would the House have to admit him or would it not, long before that, have declared his seat vacant? It would have no right to declare his seat vacant merely because he was absent, for that was voluntary, and therefore not to be construed as a resignation of the seat. If we are to follow the lead of those who contend that Roberts ought to have been sworn in, it would have been our duty, in the illustration just given, when he presented himself to be sworn in, to beg him with tender persuasiveness to honor the House by being sworn in so that it might have the felicity immediately thereafter of turning him out.

The duty of the House in such a case becomes apparent when the case is stated. Its own dignity, its own constitutional power to pass upon the qualifications of its members would demand that it hold the claimant at the threshold, inquire into the case, and, not to mention other conditions justifying exclusion, close the door upon that member who is an open, notorious violator of the solemn enactments of the body which he seeks to enter.

The fear that the action of the House creates a dangerous precedent is groundless. It exercised no power which a majority may not always exercise. Roberts was permitted to vote on the organization of the House. This was done because he held

a certificate of election and in the formative process of a legislative body there must be gathered together enough individuals with a colorable right of participation, in order that form may come out of chaos and the breath of life be breathed into what otherwise would be a mere mob. For such purpose of organization, it was a matter of no consequence whether the member-elect was sworn in or not. The first duty of those elected was to organize and for that purpose all are deemed of equal right.

The Roberts case settled, for all time I think, the right of the House to protect itself. For the wise use of that right it can be held responsible only before the bar of public opinion and by the several constituencies which create it.